No. 82-15

Office-Supreme Court, U.S.
FILED
APR 4 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE RESPONDENT

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**BRIEF AMICI CURIAE OF
AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC.
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC.,
AND THE
LEGAL FOUNDATION OF AMERICA,
IN SUPPORT OF THE RESPONDENT**

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Frank E. Haddad, Jr., Esq., counsel for the Petitioner, and Hon. Rex E. Lee, Solicitor General, United States Department of Justice, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. (AELE), as a national not-for-profit citizens organization is interested in establishing a body of law making

the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-one times in the Supreme Court of the United States, and thirty-three times in other courts, including the U.S. District and Courts of Appeals and the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. (IACP) is the largest organization of police executives and administrators in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to improve the delivery of vital police services, while at the same time protecting the rights of all citizens.

THE AIRBORNE LAW ENFORCEMENT ASSOCIATION, INC. is a professional service organization and is incorporated as a not-for-profit California corporation. The group has nearly 700 members, all of whom are full-time law enforcement pilots or flight support personnel. The association sponsors an annual three-day national training conference, and six regional aircraft safety seminars each year. Its bi-monthly magazine, *Air Beat,* is dedicated to the safe utilization of aircraft for law enforcement purposes.

THE LEGAL FOUNDATION OF AMERICA (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici's interest in the instant case arises from our concern that any retrenchment from the open fields doctrine of *Hester* v. *United States*, 265 U. S. 57 (1924), will unduly hamper the crucial efforts of state and federal law enforcement agencies in their aerial surveillance of illegal marijuana crops grown in rural areas of the country. We ask this Court to affirm the *en banc* holding of the Sixth Circuit Court of Appeals in *United States* v. *Oliver*, 686 F. 2d 356 (6th Cir. 1982), where the court held that the protection of the Fourth Amendment does not extend to open fields and does not require an *ad hoc* consideration of the facts of each case to determine whether the owner of an open field reasonably expects privacy with respect to such field. We believe that the *en banc* court properly ruled that fields of marijuana located about one mile from the petitioner's house by road, and almost that far in a direct line, were not within the curtilage of the petitioner's house, but were "open fields," and not protected by the Fourth Amendment, even though they were not observable while standing on land other than that of the defendant.

ARGUMENT

Americans for Effective Law Enforcement, Inc. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the **International Association of Chiefs of Police, Inc.**, and other national and state law enforcement groups. Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid, rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law, although we fully agree with the legal analysis submitted by the United States in this case. We confine our brief basically to a suggested resolution of certain important policy issues involved in this case as they pertain to the serious problem of narcotic law enforcement.

I.

THIS COURT SHOULD CONTINUE TO DISTINGUISH OPEN FIELDS FROM OTHER KINDS OF RESIDENTIAL AND COMMERCIAL PROPERTY.

The open lands available in this country for the growing of crops are too vast to receive the protected status of privacy. Fences are erected for the primary purpose of keeping livestock in, not to keep people out. "No trespassing" signs are usually erected to discourage hunters, not hikers, or to limit a landowner's civil liability for unsafe conditions. The law relating to open fields has developed with comparatively little controversy, although not always uniformly. This Court, however, has continually stressed the concept of reasonableness: *reasonable* searches under the Fourth Amendment, *reasonable* expectations of privacy, and *reasonable* suspicions in support of temporary detentions. *See, e.g., Terry* v. *Ohio*, 392 U. S. 1 (1968); *United States* v. *Ross*, 456 U. S. 798 (1982).

II.

THIS CASE INVOLVES THE LEGALITY OF A TERRESTRIAL ENTRY ONTO THE DEFENDANT'S FARM BY STATE POLICE OFFICERS. ANY MODIFICATION OF THE OPEN FIELDS DOCTRINE SHOULD NOT APPLY TO POLICE AERIAL SURVEILLANCE OPERATIONS.

Amici's interest in this case specifically focuses on the aerial surveillance of fields which are used to cultivate large volumes of marijuana. Many states have highly effective aerial detection and abatement programs. For example, the Florida Department of Law Enforcement, during calendar 1982, confiscated approximately 43,000 marijuana plants at 337 sites in 41 of the state's 67 counties. At least 95 percent of those seizures were solely the result of an initial aerial surveillance by fixed-wing aircraft, flying at 1,000 feet or higher above ground level. (These facts are revealed in the letter of Feb. 16, 1983, from Robert Cummings, Bureau Chief, Investigative Support Services Bureau, Florida Department of Law Enforcement, included in the Appendix of this brief.)

The Bureau of Narcotic Enforcement of California's Department of Justice operates two fixed-wing aircraft; the United States Drug Enforcement Agency also operates a fixed-wing airplane in the State of California. Together, the three aircraft log approximately 500 hours per year of flight time at heights of 1,000 to 2,000 feet, for marijuana detection purposes. In addition, several rural sheriff's departments and the forestry service operate fixed-wing and rotary aircraft, which are used intermittently for the detection of cultivated marijuana fields.

Seizures in California during 1982 involved 90,367 plants, a total of 134,107 pounds from 1,152 crops. The Chief of the California Bureau of Narcotic Enforcement has estimated that at least 70 percent of the domestic marijuana seized by a search warrant resulted from aerial observations. (A letter of March 3, 1983, from S. C. Helsley, Bureau of Narcotic Enforcement, California Department of Justice, appears in the Appendix.)

Typically, programs like those in California and Florida engage in routine air patrol over counties where marijuana has been previously cultivated. The plants are readily observable at even 2,000 feet or more altitude. In fact, pilots rarely fly low, in order that their observations will not be detected by the growers, and also to ensure the safety of the law enforcement officers. Once a sighting is made, photographs are usually taken. Later the observing officer will file an affidavit in support of a search warrant, accompanied by the photographs.

Aerial surveillance programs are not aimed at the private, recreational use of marijuana by a farmer, but at large scale, commercial production. A field may have as many as 1,000 plants, with a weight of 2,500 pounds and a wholesale value of $1,500 to $2,000 a pound.

Flight levels are regulated by the Federal Aviation Administration (FAA), United States Department of Transportation (14 C. F. R. Part 91.79). Regulations for fixed-wing general aviation craft establish a minimum height level of 1,000 feet over cities and 500 feet over sparsely populated areas, although one regulation (subpart (d)) provides that helicopters may travel just above ground level, so long as the craft can make a safe landing in an emergency and avoid other hazards. Law enforcement agencies, such as the California Bureau of Narcotic Enforcement and the Florida Department of Law Enforcement, fly fixed-wing aircraft in excess of 1,000 feet and are still able to observe and photograph marijuana-cultivated plots.

Amici submit that every landowner is aware of the fact that many thousands of private aircraft are operated for pleasure, crop dusting, pipeline inspection, traffic control and speed detection, and other purposes, at regulated levels. The actual number of private aircraft registered with the FAA, as of 1981, was 257,536. No landowner, therefore, can *reasonably* expect that aircraft will avoid his property, or that the occupants will not look down upon his fields during overflights.

Amici believe the open fields doctrine of *Hester* v. *United States*, 265 U. S. 57 (1924), should be preserved in the law of search and seizure, but if this Court is inclined to modify or even abolish that rule, it should be made clear that the Court's decision will not affect the legality of aerial surveillances for the purposes described in this brief. A person may have a reasonable expectation that narcotics officers will not trespass on his land, evade gates or jump fences, but that person does not have a reasonable expectation that aircraft will not lawfully fly over his property.*

---

* See Annotation, *"Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure,"* 56 ALR Fed 772 (1982); Granberg, *"Is Warrantless Aerial Surveillance Constitutional?"* 55 Cal. St. Bar J. 451 (Nov. 1980); Kaye, *"Aerial Surveillance: Private Versus Public Expectations,"* 56 Cal. St. Bar J. 258 (June 1981). The use of visual enhancement aids (such as gyro-stabilized binoculars) also have been upheld, see *People* v. *Joubert*, 118 Cal. App. 3d 637, 173 Cal. Rptr. 428 (1981) and cases cited therein. In that regard, this Court's recent and unanimous decision in *United States* v. *Knotts*, No. 81-1802, 51 LW 4232, 32 Cr L 3069 (1983), adds that "Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," referring to the so-called "bumper-beeper."

CONCLUSION

Amici respectfully submit that the *en banc* decision of the Sixth Circuit Court of Appeals should be affirmed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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APPENDIX

STATE OF FLORIDA

Department of Law Enforcement

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ROBERT A. DEMPSEY
Commissioner

BOB GRAHAM, Governor
GEORGE FIRESTONE, Secretary of State
JIM SMITH, Attorney General
GERALD LEWIS, Comptroller
BILL GUNTER, Treasurer
DOYLE CONNER, Commissioner of Agriculture
RALPH D. TURLINGTON, Commissioner of Education

February 16, 1983

Mr. Wayne Schmidt
Americans for Effective Law Enforcement
501 Grandview Drive, Suite 209
South San Francisco, California 94080

Dear Mr. Schmidt:

In response to your request for information concerning aerial surveillance and statistical data, let me advise you that the Florida Department of Law Enforcement has had an ongoing Domestic Marijuana Program for the last two years. The 1982 program resulted in the eradication of 43,000 plants, from 337 growing sites in 41 counties, and the arrest of 147 persons for cultivation of marijuana.

This program can directly attribute its success to aerial surveillance, which accounts for approximately 95% of all Florida's domestic marijuana confirmations. The Florida Department of Law Enforcement provides training to state and local agencies in aerial spotting from heights of approximately 1,000 feet. This method of aerial detection has proven itself invaluable through additional confirmation of sightings and statistical data which has doubled in two years.

This department views aerial surveillance as the most important and integral part of its detection of domestically grown marijuana. Without this capability the entire program would be hindered to the point of being ineffective.

If you need additional information concerning this program, please do not hesitate to call.

Sincerely,

Robert L. Edwards, Director
Division of Local Law Enforcement Assistance

Robert Cummings, Bureau Chief
Investigative Support Services Bureau

RC/dt

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

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March 3, 1983

Mr. Wayne W. Schmidt
Executive Director
AELE
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Dear Mr. Schmidt:

In response to our initial telephone conversation and your letter of February 14, we have compiled the following information.

In 1982, Bureau of Narcotic Enforcement pilots flew over 400 hours in light fixed-wing aircraft in California, dedicated to the aerial identification of commercial marijuana crops.

Our pilots fly at altitudes greater than 1,000 feet above ground level (AGL), and typically greater than 2,000 feet AGL. In addition, we also recommend to other agencies which use aircraft to locate marijuana crops, also to stay above 1,000 AGL for the following reasons.

1. This gives us a good margin above the "minimum safe altitudes" required by the Federal Aviation Regulations, Part 91, section 91.79.

2. The nature of our flights require that our aircraft not be detected, to prevent evidence from being destroyed, and for officer safety. At lower altitudes the aircraft noise is easily heard on the ground in the remote areas which we fly.

3. Our aircraft are susceptible to ground fire from suspects at lower altitudes. The higher altitudes we fly at offer a greater margin of safety.

We do not have exact figures on the percentage of sightings which are made by aircraft. However, I estimate that at least 70% of the domestic marijuana crops seized under authority of a search warrant in California during 1982 were from the result of aerial observations.

Seizures in California during 1982 involved 90,367 plants (134,107 pounds), from 1,152 crops. The wholesale price for "sinsemilla" type marijuana in California runs from $1,500 to $2,000.

Hopefully this information will assist you in preparing your Amicus Curiae brief. If I can be of further assistance to you, please call on me again.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General